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Supreme Court, U.S.
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No. 00-816

In The

Supreme Court of the United States

MONTGOMERY COUNTY; MONTGOMERY COUNTY COMMISSIONERS; MARIO MELE; RICHARD BUCKMAN; JOSEPH HOEFFEL,

Petitioners,

v.

ROBERT E. WRIGHT, SR.; MAILLIE FALCONIERO & COMPANY, LLP, GEORGE FALCONIERO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is an action seeking declaratory and damage relief based upon discrimination in terms and conditions of employment suffered by Respondent due to his race, for being outspoken at the workplace about his mistreatment due to his race and for his retaliatory discipline and termination by the Petitioners on the basis of his race and retaliation.

MISSTATEMENTS OF FACT AND LAW CONTAINED IN THE PETITION

Petitioners' misstatement of facts that bear on issues properly before this Court is axiomatic and typical for the course that this litigation has taken. See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, it is necessary to provide this correction to the perceived misstatements of facts so that this Court is not misled. The record before this Honorable Court shows that among the specious, intentional misstatements that the Petitioners have asserted in their petition, was that Respondent was alleging that the racial discrimination occurred after and as a result of the HUD investigation. Respondent alleges that he was terminated in retaliation for speaking out against Petitioners' racially discriminatory employment practices, which preceded the HUD investigation (App. 1197a) (Appendix to the record below.). Additionally, this case is not about the application of immunities to a local governmental body's decision to suspend a county's federally funded program and terminate employees. It is

about Petitioners' targeting a particular employee for termination rather than the position that an employee happens to hold.

The two white employees, who were also terminated, were not terminated with Respondent. They were terminated prior to Respondent, based upon Respondent's recommendation for disciplinary action as their supervisor (App. 1197a).

Respondent did not award contracts directly (App. 1198a). Respondent did not control the inspection of the contractors' work (App. 1199a). Respondent did not approve payment to contractors (App. 1199a). Respondent acknowledged that he utilized subcontractors who had performed for the HUD program. None of the properties that the contractors worked on were part of any federally funded program, nor were they even within the same municipality that received funds from the federally funded program. He did not violate the conflict of interest provisions under the HUD regulations. It is acknowledged in the final HUD report of May 20, 1996 that Respondent paid fair market value for the services rendered by the contractors and that the negotiations were at arms-length (App. 449a). It is further acknowledged in the final HUD report that a distant relative of Respondent, his mother's second deceased husband's brother, received a contract for roofing work in 1991, which was prior to Respondent becoming director of the housing program (App. 449a).

Respondent is accused in this litigation by the Petitioners of lying to HUD, to a federal grand jury, the U.S. attorney and to Montgomery County, committing federal

and state tax fraud, violating the federal currency transaction report act, violation of the federal and state labor laws, committing fraud upon the federally funded housing programs, committing fraud upon federally insured financial institutions, committing bankruptcy fraud and insurance fraud. If petitioners are to be believed, everyone that Respondent has been in contact with, did business with, had any association with, was related to, employed or supervised, spoke to, knew, lent money to, or had conversation with, was part of this fraudulent scheme. Petitioner Montgomery County had employed Respondent for approximately 17 years, first with the Montgomery County Redevelopment Authority, then with the Department of Housing Services. Petitioners' Brief Appendix at A-3-4. Respondent was promoted to the Director of the Department of Housing Services of Montgomery County on or about July 1, 1994. Respondent was the only Black employee of Petitioner Montgomery County to become a department head. He was the first Black employee of Petitioner Montgomery County to be a department head in Montgomery County. Respondent's department received praise for the achievements of his department from HUD in accomplishing its housing and community goals (App. 2885a-2887a).

Respondent was suspended without pay from his position on April 22, 1996 and was escorted out of his office by the county's security staff (App. 2993a). Petitioners conducted no internal investigation or other review of Respondent (App. 1268a). The Petitioners based their decision to suspend Respondent without pay on the draft HUD Audit Report of April 1996 (App. 2993a). Among other things, the draft HUD Audit Report

accused Respondent of conflict of interest (App. 153a). The Final HUD Audit Report is equivocal on that issue (App. 449a). The Petitioners terminated Respondent on June 13, 1996 (App. 1791a-1793a). The two white employees were terminated on March 11, 1996, by the Chief Operating Officer for Montgomery County, Nicholas D. Melair, Jr. (App. 2888a). Respondent had requested a grievance hearing pursuant to county policy but was informed that he was not entitled to one (App. 2849a). Petitioners' counsel informed Respondent that he was not entitled to a due process hearing (App. 1279a).

Petitioner Hoeffel, prior to the HUD investigation, had accused Respondent of illegally rigging the competitive bidding procedure to favor one contractor over others (App. 2802a). Petitioner Hoeffel had accused Respondent of permitting botched projects to go uncorrected. Petitioner Hoeffel had accused Respondent of favoring one owner over another. Petitioner Hoeffel questioned and criticized Respondent in the public and at public meetings concerning his past management style and his ability to manage the office in general. Petitioner Hoeffel tried to have Oscar Vance, chief of the county detectives, investigate Respondent criminally, accusing him of being a drug kingpin (App. 1270a-1271a).

Respondent had complained to the County Solicitor about the public comments and inferences that Petitioner Hoeffel's statements were creating. Nothing was done about Respondent's complaints to the County solicitor about the public comments. No other county employee had his personnel matter discussed at public meetings or to the press (App. 2792a).

The final HUD Report of May 1996 (App. 426a) reviewed and evaluated the department, its policies and the implementation of the program during a period of time when Respondent was not its director. This was markedly different from the draft report issued earlier.

On July 2, 1996 and July 3, 1996, Respondent met with the county commissioners to demonstrate to them the errors in the draft and final HUD Audit Reports. This was not a due process hearing (App. 1248a). Respondent was denied his request to have certain county employees appear as witnesses and have certain documents produced to present at the meeting on July 2 and 3, 1996 (App. 1281a, 1268a-1269a).

Petitioner Mele permitted a holding company's president to conduct a political fund-raiser at his home for Mele, and Mele later awarded his company the reassessment contract for the county which paid over $7.7 million (App. 2867a-2872a and 2990a).

Petitioner County Commissioners claim that they are not obligated to abide by the county policy concerning conflicts of interest (App. 3006a). Nor, apparently, must any other county employee be concerned about termination if they engage in conflict of interest (App. 1249a); criminal acts (App. 1235a-1238a). The Petitioners' assertions of terminating Respondent for business reasons, relating to the draft HUD Audit Report are contrived, baseless and pretextual. Their actions were racially motivated and were retaliatory for his complaining of mistreatment on a racial basis. Respondent had complained in the past about racial harassment and mistreatment (App. 1256a-1263a). Respondent had complained that the

HUD investigation was instigated by Petitioners and was just another act on their part that was racially motivated (App. 538a-540a). It was not unusual for Petitioners and other high-ranking officials to be accused of racism (App. 1251a-1255a), and had been for years.

REASONS WHY THE PETITION SHOULD BE DENIED

The substantive questions presented by the Petition are whether the qualified immunity analysis by the United States Court of Appeals for the Third Circuit is in conflict with this Court and other Circuits and whether the denial of absolute immunity by the United States Court of Appeals for the Third Circuit is in conflict with this Court. The Third Circuit's decision in this case is not in conflict with this Court or any of the Circuits on the question of qualified immunity. See *Brady v. Gebbie*, 859 F.2d 1543 (9th Cir. 1988). Further, there is no conflict on the question of absolute immunity with this Court. These issues need not be reviewed or revisited by this Honorable Court. The Third Circuit's decision was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

The conflicts raised by the Petitioners are not what Petitioners claim them to be. The Petitioners have created straw men to attack. Neither the Third Circuit's actual ruling, nor the record below, raises the question of immunity, both qualified and absolute, as presented by the Petition. The rulings by this Court in *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), are consistent with the ruling by the

Third Circuit in this matter. Petitioners have tried to make out a case of precarious abandonment of the doctrine of immunity when it is nothing more than a factual dispute to be resolved by the jury. See *Johnson v. Jones*, 515 U.S. 304 (1995). The Third Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

Additionally, Pursuant to Rule 15.2, the misstatements of facts and law are so flagrant and are intended to mislead this Honorable Court; this alone is sufficient for the Court to deny the petition filed by the Petitioners. The Petitioners cannot remedy this defect in the petition in any subsequent filings.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS AND THIS COURT ON AN IMMUNITY ANALYSIS

In a disingenuous attempt to grab this Court's attention, Petitioners argue that the Third Circuit's ruling is at odds with this Court and will result in a chilling effect on public officials. Further, Petitioners claim that the Third Circuit is in conflict with the Eleventh Circuit in its approach in assessing qualified immunity. In *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996), the Eleventh Circuit found that the plaintiffs had failed to demonstrate that the defendant had violated a clearly established federal law. It further held, in *Johnson v. City of Fort Lauderdale, Fla.*, 126 F.3d 1372 (11th Cir. 1997), that after the plaintiff has presented a violation of a constitutional right, it must then determine whether the defendant's conduct was objectively reasonable. All factual disputes must be resolved in favor of the plaintiff. The question posed in

Stanley v. City of Dalton, Georgia, 219 F.3d 1280 (11th Cir. 2000), was that of sufficiency of evidence to prove the underlying constitutional violation and a clearly established law. The Third Circuit's analysis of the case below is consistent with that utilized in *Stanley, supra*. Petitioners, therefore, have cited no contrary proposition. The distorted analysis presented by Petitioners cannot be considered substantial authority to create a conflict with the decision below. This does not require certiorari review.

II. THE DECISION BELOW IS CLEARLY CORRECT

The Third Circuit understood that this Court's decisions in the area of immunity is not based upon an official's "desire to avoid the personal costs and aggravations of presenting a defense", but rather to avoid "the social costs of the underlying litigation, and for ensuring and preserving the effectiveness of government". A-12. Local legislators are absolutely immune from liability for their legislative activities. However, for an act to be legislative depends on the nature of the act and not the motive or intent of the actor. See *Bogan v. Scott-Harris*, 523 U.S. 44 (1998). However, for an act to be legislative, it must be both substantively and procedurally legislative in nature. *Carver v. Foerster*, 102 F.3d 96 (3d Cir. 1996).

The decision of the court below is straightforward and unambiguous. The Petitioners' decision to terminate Respondent "fails the substantively-legislative test. The decision did not involve a matter of general policy, applicable to a variety of circumstances, not to a range of County employees. Quite to the contrary, the decision

targeted a particular employee suspected of specific acts of mis- and malfeasance." A-16.

The Third Circuit's decision, in rather blunt terms, stated that they did not need to consider whether the act of firing Respondent was procedurally legislative since the act was not legislative in substance. "Firing a particular employee is a personnel decision that does not involve general policy making." A-17. The petitioners' act was not "an integral step in the legislative process. The actions of an executive or administrative nature such as this are not entitled to absolute immunity." A-17.

III. PETITIONERS' INTERPRETATION IS UNTENABLE

Petitioners' principal argument, after cutting through all of the misdirection and misstatements, is that elected officials should enjoy absolute and qualified immunity for all acts done while they occupy their office. This is neither grounded in case law nor the facts of this case. They attempt to portray the denial of immunity as having a momentous impact or chilling effect on those taking on official capacities and participating in public service. The contrary has never been truer. Except for those elected officials who are "plainly incompetent" or who "knowingly" violate the law, *Malley v. Briggs*, 475 U.S. 335 (1986), all may perform their duties and responsibilities unfettered as they were elected to do. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Stewart v. Baldwin County Board of Education*, 908 F.2d 1499 (11th Cir. 1990). There will be no harsh or widespread consequences of this decision opening up the floodgates.

After considering the relevant facts and the applicable law, the Third Circuit properly held that Petitioners were bound by its finding that Respondent has alleged the violation of a clearly established right and that the Petitioners are not entitled to qualified immunity. A-19. Also see *Seigert v. Gilley*, 500 U.S. 226 (1991). This case raises no significant issue of immunity that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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